

**CITIZEN ADVISORY COMMITTEE RETREAT
ISSUE B - INTERACTION OF STATE VERSUS FEDERAL REQUIREMENTS**

What is the relationship between a Wisconsin regulation and pending federal regulations that will require mercury emission reductions from electric utility boilers and industrial boilers?

ALTERNATIVES:

1. Set a reasonable first stage reduction that can be met. Then set a second stage reduction consistent with the federal MACT or federal law.
2. Develop specific rule language that avoids penalty for early action if MACT rules are defined as percent reduction from historic baseline.
3. Clearly state in rules that requirements i.e. cap, offsets do not apply to sources covered by a MACT standard.
4. Instead of having two reviews of the rule at certain dates, have the first review occur immediately after promulgation of MACT standard and the second as currently written in the proposed rule.
5. Include rule language that mandates that the state proposal be consistent and no more stringent than the federal MACT for utilities (applies to any federal MACT).
6. Indefinitely postpone the state rule until the federal programs for mercury emissions are in place.
7. Set the first and second stage reductions conditional on the federal MACT or federal law.

COMMITTEE DISCUSSION:

This is a very significant issue for the committee. Most committee members agreed that one of the goals of the proposed rules is to encourage and accomplish early action at the state level in anticipation of federal standards. However, no clear preference arose out of the dialogue. It is clear that there is a shared interest in having timely comparisons of state rules with federal proposals, particularly evaluations of two pending federal MACT standards, industrial and commercial boilers and utility boilers (see Issue C).

However, for some committee members it is important to have specific rule language, as in Alternative 5., that mandates how the rules should change in response to a promulgated federal MACT standard or new federal law. It is clearly the interest of some committee members not to have more stringent state requirements than requirements that would eventually be set in federal regulation or federal law. Taking action before federal requirements is acceptable to some committee members but not at the risk of economic penalty if the action they take goes beyond the eventual federal requirements. Some committee members noted that state rules must provide a means for assuring baseline protection and avoiding penalty for early action.

Other committee members are not in favor of prescriptive language in the rules. Instead they suggest that staff conduct an evaluation focusing on reconciliation of the differences and make recommendations to the Natural Resources Board on appropriate actions including suggested possible revisions to state rules.

PROVISIONS IN THE PROPOSED RULE:

No specific provisions in the proposed rules.

ADDITIONAL BACKGROUND:

The Technical Advisory Group is preparing a brief on this issue.

Jeff Schoepke - WMC

Wisconsin law, Stat. §285.27(2)(a), provides the following relating to this issue:

If an emission standard for a hazardous air contaminant is promulgated under section 112 of the federal clean air act, the department shall promulgate by rule a similar standard but this standard may not be more restrictive in terms of emission limitations than the federal standard . . .

USEPA is under court order to promulgate utility emission standards (MACT) under section 112 of the federal clean air act. Those regulations will specifically regulate mercury emission from the four “major utilities” that would be subject to the proposed rule, as well as certain other utilities covered as “major stationary sources.” The court-ordered deadlines for this rule are as follows:

- Dec. 15, 2003 – Proposed rule
- Dec. 15, 2004 – Final rule
- Dec. 15, 2007 – Compliance Deadline

USEPA is also promulgating industrial boiler MACT under section 112 of the clean air act. Those regulations will specifically regulate mercury emission from all the industrial sources listed in the draft rule as “major stationary sources” due to mercury emissions from boilers. The current schedule for this rule-making effort is as follows:

- Summer, 2002 – Proposed rule
- Summer, 2003 – Final rule
- Summer, 2006 – Compliance Deadline

SUMMARY OF PUBLIC COMMENT:

Wisconsin Utilities Association - We are concerned that the State of Wisconsin has set its sights too high in order to be leader and influence federal mercury rules. The federal government, through the EPA, will be coming out with rules in 2003 requiring utilities nationwide to cut mercury emissions. Wisconsin utilities will be subject to these regulations. Wisconsin can still be a leader by treating rules that bridge the gap to the pending federal regulations.

Wisconsin Paper Council – A national approach to mercury control would avoid the potential for conflicting state and federal regulations. Debate at the federal level needs to be finalized before potentially conflicting state regulations are considered.

Wisconsin Electric – The federal MACT process drives stringent mercury controls for utility boilers, with a compliance date of 2007. The proposed state rules are an assurance that some action is being taken by Wisconsin, even if there are delays at the federal level. Recommend moving forward with implementing a reasonable first rule phase, and then condition the second phase of the rule on the outcome of the federal MACT standard. At this point, we see no need for a third phase. The state rules must also provide a means for facilitating a transition to federal standards, including assuring baseline protection and avoiding penalty for early action. Without a predetermined mechanism, sources that make reductions in advance of a federal MACT standard will automatically lower their baseline for applicability of the federal standard, and/or will not

have the opportunity to use early reductions as part of a future compliance margin – which is especially important when implementing new control technologies.

Alliant Energy – The rule provisions offer no certainty that Wisconsin utilities will not continue to be subject to more stringent mercury reduction requirements than the rest of the country. The proposed rules should have language that Wisconsin facilities will not be required to control mercury beyond any federal requirements.

Wisconsin's Environmental Decade – Wisconsin must send a strong message to other states and the federal government about addressing the largest source of mercury pollution that we have control over and by acting first we can positively influence federal mercury regulations, the result being a “Wisconsin-friendly” regulation.

Stora Enso – Concerned that the proposed rules conflict with federal regulations currently being considered for both utility and industrial boilers. There is no advantage for the DNR to move forward ahead of USEPA. A federal rule will provide a more consistent approach to mercury control and will not cause an economic disadvantage for sources located in Wisconsin.

Wisconsin Manufacturers and Commerce – Sources covered by federal hazardous air emission standards must be exempt from the state mercury rule. According to state statutes if a source is subject to federal hazardous air emission standard, DNR mercury rules cannot be more stringent. In addition, proceeding ahead of the pending federal programs will be counterproductive, as inconsistencies in the state and federal programs will hamper implementation of mercury emission programs.

COMMITTEE MEMBER INTERESTS:

Bill Skewes - WUA

This refers to certification of reductions, but additional language is needed to ensure that Wisconsin utilities are credited for mercury emission reduction achieved prior to enactment of federal rules.

Joe Shefchek- Alliant Energy

Since federal MACT is mandated it must be promulgated by 2004 with initial compliance by 2007. Federal MACT is a performance standard compared to NR 446 that also includes cap and trade provisions. These are two fundamentally different regulatory approaches that may conflict in defining which emissions sources are subject to each rule and also what technologies are used to reduce mercury emissions. In addition, triggering thresholds and compliance methods (testing, monitoring, record keeping and reporting) may not be the same for NR 446 and federal MACT. Finally, it is not clear whether sources will get credit for early mercury reductions made under NR 446 towards compliance with MACT. Similarly, under federal rules cannot be certified as credits for pollution reduction projects.

Thus reconciliation of the WI Hg rule versus the proposed Federal MACT is not only critical to a successful program, but also legally necessary per Wisconsin law, Stat. §285.27(2)(a), provides the following relating to this issue:

If an emission standard for a hazardous air contaminant is promulgated under section 112 of the federal clean air act, the department shall promulgate by rule a similar standard but this standard may not be more restrictive in terms of emission limitations than the federal standard.

Marc Looze - WED

It is crucial that WI move ahead of the federal government in reducing mercury. The Bush Administration has expressed interest in eliminating the MACT process of the Clean Air Act through the "Clear Skies Initiative." Waiting for a MACT standard that may never go into effect ignores the impact that WI's mercury emissions have on our state's and others' waters. A WI rule offers several advantages over simply waiting for a federal MACT standard:

1. The proposed state rule is more comprehensive (i.e. potentially affects more sources).
2. The proposed state rule will result in emissions reduction sooner.
3. The proposed state rule can reflect characteristics of WI's power plants.
4. WI's rule can put additional pressure on EPA to develop a standard that gets us much needed reductions in upwind states, yet it can provide more flexibility in achieving those reductions (e.g. phasing in reductions to give utilities time to gain experience with new technologies).
5. WI's rule can be more flexible in numerous ways (e.g. a variance provision that takes reliability into account, allows fuel switching, etc.).

Jeff Schoepke - WMC

State law prescribes the fundamental test for any air toxics regulation – such regulation must be "similar" and "may not be more restrictive in terms of emission limitations than the federal standard." DNR's proposed mercury rule is on a collision course with this state law. For example, an underlying compliance precept of the proposed rule is the trading of mercury emission reductions. In contrast, section 112 of the clean air act prohibits trading. Thus, we know now that DNR rule will not be "similar" to the pending federal rules. In addition, caps are inconsistent and often more "restrictive" than emission rates, which will be approach taken by EPA in its pending MACT standards.

WMC is aware of no sources listed in the proposed rule that are not subject to existing or will be subject to proposed federal mercury regulations. Because of the inevitable inconsistencies between the federal and state programs, the regional nature of mercury emissions, and the likelihood federal rules will better address the mercury problem, WMC believes the state rule must be indefinitely postponed until the federal programs are in place.

Wayne Stroessner – Random Lake

Do not wait for Federal MACT rules to determine Wisconsin's mercury clean-up process. In a March 4, 2002, Milwaukee Journal Sentinel article in the Business section, a caption reads: "Pollution control may shift to states - Administration policies seek lesser role for D.C." "The Bush administration...is seeking to shift responsibility for pollution control to local governments and private interests." If that is the case, it should rightfully be the responsibility of Wisconsin's DNR to set the rules (and not wait for MACT) for protecting our citizens and all of our natural resources.

Mark Yeager - ECCOLA

Wisconsin taking definitive action toward cleaning up mercury emissions will bring health & environmental benefits to its citizens sooner than Federal requirements. With the Bush/Enron political approach to energy policy & pending court reviews we cannot rely on the promise that the EPA "will" make clear rules, much less promulgated by 2004 or complied with by 2007. Early WI action will help define the market for technology required to meet cleaner emission standards.

Ed Wilusz – WPC

The paper primarily references the utility MACT. However, it should be made clear that there are other MACT standards in various stages of development that could come into play. Of most interest to the paper industry are the chemical recovery MACT (already in place) and the industrial boiler MACT (expected to be proposed later this year). However, there are other MACT standards that affect other source types. With regard to the industrial boiler MACT, we anticipate a mercury limit of 3-4 pounds per trillion BTU to be included in the federal proposal. Because of the potential for mercury limits in other MACT standards, Alternative 2 should be amended to apply to any federal MACT, not just the utility MACT.

Also, there are legal issues, such as state requirements relating to the adoption of federal MACT standards and federal requirements relating to the use of trading as a compliance option, that were presented to the CAC and should be reflected in the issue paper.

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